

**Staff
Summary
Report**



To: Mayor & City Council
Through: City Manager

Agenda Item Number
Meeting Date 08/08/02

SUBJECT: Approval of an agreement with Entertainment Solutions, Inc. for an annual concert program at Tempe Beach Park.

PREPARED BY: Mark Richwine, Parks and Recreation Director, 480/350-5325

REVIEWED BY: Ron Dunham, Assistant City Attorney, 480/350-8814
Chris Anaradian, Rio Salado Project Manager, 480/858-2204
Jody Ulich, Cultural Services Director, 480/350-5320
Tom Canasi, Community Services Manager, 480/350-5305

BRIEF: Request approval to enter into an agreement with Entertainment Solutions, Inc. for the production of an annual concert series at Tempe Beach Park.

COMMENTS: **COMMUNITY SERVICES ADMIN (0701-01)** Request approval to enter into an agreement with Entertainment Solutions, Inc. for the production of an annual concert series at Tempe Beach Park at a cost of \$44,000. The series will include six (6) concerts in the fall of 2002 and sixteen (16) concerts in the winter/spring of 2003.

Document Name: (20020808csmr01) Supporting Documents: yes

SUMMARY: It is the desire of the Community Services Department and Economic Development /Rio Salado to enter into an agreement with Entertainment Solutions, Inc. for the production of an annual concert series at Tempe Beach Park. The agreement is for 2002 and provides for additional options to be exercised at the mutual agreement of both parties for an additional four (4) years.

Entertainment Solutions has produced numerous concerts in the Phoenix area and serves as the entertainment manager for the annual Tempe Tostito's New Year's Eve Block Party.

FISCAL NOTE: The agreement will pay Entertainment Solutions \$44,000 annually for the production of twenty-two (22) concerts. \$16,000 of the annual amount will be paid from Cultural Services and \$28,000 from Economic Development.

RECOMMENDATION: Staff recommends approval of the agreement and authorization for the Parks and Recreation Director to sign the agreement on behalf of the City.

**“TEMPE BEACH PARK
ANNUAL CONCERT SERIES”
AGREEMENT**

THIS AGREEMENT between the City of Tempe ("Tempe"), an Arizona municipal corporation (event owner), and Entertainment Solutions of Arizona, Inc. (Entertainment Solutions), an Arizona corporation, is for the purpose of promoting, marketing, producing, managing and conducting an annual concert series in Tempe Beach Park in accordance with the terms and conditions set forth within.

WHEREAS, Tempe desires to provide special events promoting the Rio Salado project, Tempe Town Lake and Tempe Beach Park for the community and visitors, and

WHEREAS, the parties to this Agreement are desirous in developing an annual concert series to be conducted in Tempe Beach Park, and

WHEREAS, the parties to this Agreement recognize that an annual concert series furthers the objectives of Tempe in promoting the Rio Salado project.

NOW, THEREFORE, in consideration of the premises and the mutual obligations of the parties hereto, the parties agree as follows:

1. Status of Parties.

The City of Tempe, as owner of Tempe Beach Park, hereby grants to Entertainment Solutions the right to produce an annual concert series (minimum 22 events) including its planning, development and implementation.

2. Event Site

The site for the concert series shall be Tempe Beach Park (park), Rio Salado Parkway and Mill Avenue. The primary venue for the concerts shall be the Tempe Beach Park Amphitheater.

3. Tempe's Contributions.

Tempe will provide Entertainment Solutions with:

- A. \$44,000 for the production of an annual series of 22 concerts, 6 to be held in the fall of 2002 and 16 to be held in the winter/spring of 2003. Dates and times of all performances to be scheduled at the mutual agreement of Tempe and Entertainment Solutions. Payments to Entertainment Solutions to be made as follows:

\$12,000 – on or before October 1, 2002 (annually thereafter)

\$16,000 – on or before January 1, 2003 (annually thereafter)

\$16,000 – on or before March 1, 2003 (annually thereafter)

- B. In addition to the monetary contribution, Tempe will provide the use of its' "showmobile" at no charge as a stage for all concert programs, access to utilities within the park and waive, where appropriate, permit costs for the event, electrical service, event set-up and park rental fees.
- C. Shall any concert(s) require the presence of Public Safety personnel, to be determined solely at the discretion of Tempe, Entertainment Solutions shall be responsible for reimbursement of the costs associated with having such personnel present at the event.
- D. Shall the concert(s) require additional maintenance services for park cleaning or restroom cleaning, to be determined solely at the discretion of Tempe, Entertainment Solutions shall be responsible for reimbursement of the costs associated with having such personnel present at the event.
- E. Tempe shall provide marketing support for the annual concert series to include a supplement in the Tribune Newspapers (minimum 8 pages) twice annually during the term of this agreement. Tempe shall also provide additional marketing support such as water bill inserts, display ads in City publications, internal calendar listings, web site listings, event information phone line, etc. (based upon availability). Tempe shall also provide signage locations (i.e. light poles, street poles) at existing locations in Tempe Beach Park, Mill Avenue, and other locations (based upon availability). Said signage will be produced and paid for by Entertainment Solutions.

4. Entertainment Solutions's Responsibilities.

- A. Entertainment Solutions will be responsible for overall content of the concert program, including but not limited to design and decorations, accounting, sponsor solicitation and coordination, entertainment, merchandising, marketing, promotion and other elements associated with the successful implementation of a concert series that may not be delineated above. Entertainment Solutions shall consult with Tempe (Rio Salado Marketing Coordinator or other staff as assigned) towards the development and submittal of a marketing plan by September 1, 2002 (annually thereafter). This document shall include event planning related to promotion, publicity, marketing, patron surveying, advertising, sponsorship affiliation, and signage for the 22 concerts.
- B. Entertainment Solution's agreement with Tempe is subservient to other agreements Tempe has or may enter into within the park. Entertainment

Solutions will honor all current and future agreements that Tempe shall enter into for concession services within the park allowing the concessionaires to work per their contracts with Tempe without significant impact by Entertainment Solutions, its subcontractors, employees or agents. Such impacts will be determined to be "significant" by the Tempe Rio Salado Park Vendor Contract Administrator, the Rio Salado Manager.

- C. Entertainment Solutions will develop Income/Expense Budget Projections, accounting procedures and audit for the concert series and supply to Tempe a certified financial statement of all expenditures and revenues associated with the concert series within 90 days of the last concert. Entertainment Solutions will establish a separate "concerts series account" ("Account") as a special fund to carry out the purposes of this Agreement and is empowered to authorize and approve all concert series expenses from this Account, subject to review by Tempe.
- D. Entertainment Solutions shall serve as fiscal agent for the concert series and will provide accounting and financial reporting services to Tempe for the same. Tempe shall have the right, upon reasonable prior written notice, to examine the financial records and books directly relating to the concert series.
- E. Entertainment Solutions will manage and coordinate all sponsor contracts for the concert series. Tempe reserves the right to review and approve all sponsors for the program so as to maintain the family friendly atmosphere intended with the program.
- F. Entertainment Solutions shall submit to Tempe its preliminary plans for the following details by October 1, 2002:
 - i. Venue, site plan and layout.
 - ii. Concessions.
 - iii. Event Staffing.
 - iv. Proof of Event Insurance in amounts set by Tempe.

5. **Entertainment Solutions is Responsible for Expenses in Excess of Budget.**

The parties hereto agree that Entertainment Solutions will not exceed the agreed to budget pursuant to **paragraph 4 above**. The parties agree that Tempe shall not be responsible for any portion of any amount beyond that contained in the budget unless it is an additional amount approved in writing by Tempe.

6. **Other Terms and Conditions.**

- A. Compliance With Laws. Entertainment Solutions agrees to conduct and execute this Agreement and implement the concert series in compliance with all applicable local, state and federal laws and in compliance with all laws which are applicable to Tempe and Entertainment Solutions with regard to this event.
- B. City Permits, Licenses, Taxes, Outdoor Events. Entertainment Solutions shall comply with and ensure compliance with Tempe City Code and regulations governing outdoor events, and other applicable ordinances and regulations. Entertainment Solutions shall maintain in current status all federal, state, county and city licenses and permits required for the operation of the concert series and the business conducted by Entertainment Solutions as applicable to this Agreement.
- C. Independent Contractor Relationships. Except as may be otherwise set forth herein, no party to this Agreement shall have any responsibility whatsoever with respect to services provided or contractual obligations assumed by the other party.
1. Entertainment Solutions, its subcontractors, employees, agents or representatives, in the performance of all work, services and activities under this Agreement or any subcontract, are independent, and not an employee, agent or servant of Tempe. Entertainment Solutions' relationship and the relationship of its employees to Tempe shall be that of an independent contractor and not as employees or agents.
 2. City of Tempe employees, agents or representatives, in the performance of all work, services and activities under this Agreement, are considered at all times to be employees of the City of Tempe, and not as employees, agents or servants of Entertainment Solutions.
- D. Insurance and Indemnifications. Entertainment Solutions shall indemnify, defend and save harmless Tempe, its employees, officers and directors, from any and all alleged claims, demands, suits, actions, proceedings, loss, cost and damages of every kind and description, including any attorney's fees or litigation expenses which may be brought or made against or incurred by Tempe, its employees, officers and directors, on account of loss of or damage to any property or for injuries to or death of any person caused by, arising out of, or contributed to, in whole or in part, by reason of any act, omission, professional error, fault, mistake or negligence of Entertainment Solutions, its employees, agents or representatives, in connection with or incident to the performance of this Agreement. Entertainment Solutions' obligation under this subparagraph does not extend to any liability ultimately

determined by law or judicial order to have been caused by the negligence or willful misconduct of Tempe, or its employees, officers and directors. Entertainment Solutions shall require any subcontractor to indemnify and defend Tempe, its employees, officers and directors, by inserting indemnity language substantially similar to this subparagraph, in any subcontract agreement or arrangement Entertainment Solutions enters into related to this Event.

- E. Entertainment Solutions shall provide insurance, evidenced by certificate issued to Tempe, for such amounts and coverages as are satisfactory and approved by Tempe, with minimum amounts and coverages as specified by the Tempe City Manager or his authorized representative, naming Tempe, its employees, officers and directors, as additional insureds, to protect against loss arising out of this Agreement and the performance thereof. Event insurance obtained by Entertainment Solutions covering all the parties shall be included as an Expense.
- F. Symbols, Trademarks, Copyrights, Broadcast and Media Rights. Tempe and Entertainment Solutions may authorize in writing a temporary nonexclusive license for use of applicable trade name, trademark, symbol, insignia or emblem in advertising, promotion, signage, broadcast or other uses. All broadcast and media rights are reserved to Tempe and Entertainment Solutions. This Agreement does not authorize the broadcasting, telecasting or transmission by wire or otherwise of any concert ("Broadcasting") without permission of Tempe and Entertainment Solutions.
- G. Subcontracts. Entertainment Solutions shall be responsible for negotiating, executing and causing the performance of any subcontracts related to its responsibilities for the concert series or as needed to carry out the responsibilities as defined in this Agreement. All subcontracts shall comply with federal, state and city laws and regulations which are applicable to the services covered by the subcontract and shall include all terms and conditions set forth herein which shall apply with equal force to the subcontract as if the subcontractor were the contractor referred to herein. Entertainment Solutions is responsible for contract performance whether or not subcontractors are used.
- H. Audit and Records. Tempe may, at reasonable times and places, audit the books and records of Entertainment Solutions, as related to this Agreement. Entertainment Solutions shall preserve and make available for inspection to Tempe all financial records, supporting documents, statistical records and any other documents pertinent to this Agreement for a period of three (3) years after the termination of this Agreement. This provision shall survive the termination of this Agreement. Upon termination of this Agreement, all materials and records produced by Entertainment Solutions pursuant to this

Agreement and a final reconciliation of the Entertainment Solutions Account, accompanied by documentation of all expenditures therefrom shall be provided to Tempe.

- I. Time of Essence. The parties agree that time shall be of the essence in this Agreement and the representations and warranties made are all material and of the essence of this Agreement.
- J. Right to Assurance. Whenever a party to this Agreement in good faith has reason to question another party's intent to perform, he may demand that the other party give a written assurance of his intent to perform. In the event that a demand is made and no written assurance is given within five (5) business days, the demanding party may treat this failure as an anticipatory repudiation or default of the Agreement.
- K. Term. The term of this Agreement ("Term") shall be for Five (5) consecutive fiscal years (July 1- June 30) beginning July 1, 2002, unless sooner terminated by mutual agreement of the parties. The agreement shall be renewed annually upon the mutual consent of both parties.
- L. Termination and Cancellation. This Agreement may be cancelled by a party for an Event of Default committed by another party as provided in paragraph 7 below. In the event of cancellation or termination prior to the end of the Term, an accounting of monies related to this Agreement will take place. After the accounting, and upon mutual consent of the parties, all monies to which Tempe is reasonably entitled will be paid to Tempe and all monies to which Entertainment Solutions is reasonably entitled will be paid to Entertainment Solutions. . The parties acknowledge that this Agreement is subject to cancellation by Tempe pursuant to A.R.S. Sec. 38-511.

7. Cancellation for Default.

- A. This Agreement is critical to Tempe and Tempe reserves the right to cancel the whole or any part of this Agreement in the Event of Default by Entertainment Solutions. This Agreement is also important to Entertainment Solutions, which reserves the right to cancel the whole or any part of this Agreement in the Event of Default by Tempe.
- B. An "Event of Default" by Entertainment Solutions shall be for acting or failing to act as described below, including:
 - i. Failing materially to adequately perform the services set forth in the specifications or the Agreement.

- ii. Failing to complete the work required or furnish the materials required within the time stipulated in the Agreement.
 - iii. Failing to make progress in the performance of the Agreement and/or giving Tempe reason to believe that Entertainment Solutions will not or cannot perform to the requirements of the Agreement.
 - iv. Failure by Entertainment Solutions to pay any sums when due hereunder or materially breaching any promise or covenant made herein.
- C. An "Event of Default" by Tempe shall be for acting or failing to act as described below, including:
 - i. Failing materially to adequately perform the services set forth in the specifications or the Agreement.
 - ii. Failure by Tempe to pay any sums when due hereunder or materially breaching any promise or covenant made herein.
- D. A party wishing to cancel for an Event of Default shall deliver a written notice of default effective at once and not deferred by any interval of time, which notice shall provide the defaulting party ten (10) days from the date of delivery of the notice to the defaulting party to cure the breach or default unless a shorter time is specified herein. Upon a failure by the defaulting party to cure within such time period, the party canceling for default shall deliver a notice of cancellation to all parties, which is effective immediately and not deferred by any interval of time unless otherwise stated by the canceling party.
- E. The parties may resort to any single or combination of the following remedies in the Event of Default:
 - i. Cancel any contract,
 - ii. Reserve all rights or claims to damages for breach of any covenants of the Agreement;
 - iii. In case of default, Tempe or Entertainment Solutions reserves the right to purchase materials, or to complete the required work in accordance with the needs of Tempe or Entertainment Solutions.

8. **Spirit of Support.**

Tempe and Entertainment Solutions agree to provide cooperation and proactive support of all mutually agreed upon actions and decisions, helping to assure timely response and productive solutions for the concert series.

9. Warranties.

Entertainment Solutions and its operational manager shall insert the following language, or language substantially similar, in any subcontract:

"The subcontractor warrants that all material, service or construction delivered under the contract shall conform to the requirements of the contract and the Agreement between Tempe and Entertainment Solutions shall be free from defects in material, workmanship and design and will be fit for the intended purposes. Mere acceptance of the material, service or construction specified and any inspection incidental thereto by Tempe or Entertainment Solutions shall not alter or affect the obligations of the subcontractor or the rights of Tempe or Entertainment Solutions under the foregoing warranties."

10. No Waiver.

No waiver of any provision in this Agreement shall be effective unless it is in writing and signed by the party against whom it is asserted, and any such written waiver shall only be applicable to the specific instance to which it relates and shall not be deemed to be a continuing or future waiver.

11. Jurisdiction, Venue and Governing Law.

- A. All parties hereby irrevocably submit to the jurisdiction of the Arizona state or federal courts in any action or proceeding arising out of or relating to this Agreement and hereby irrevocably agree that all claims in respect to such action or proceeding may be heard and determined in Maricopa County, Arizona, the venue situs. The parties agree that this Agreement shall be construed and interpreted according to the laws of the State of Arizona.
- B. Whenever in this agreement rights or duties of Entertainment Solutions are governed by a standard of reasonableness, and Tempe contends that the standard has not been met, the matter shall be submitted to and determined by mediation. Either party is entitled to seek mediation and shall have the right to demand, upon written notice, mediation specifying the standard(s) of reasonableness with regard to which the mediation is demanded.

12. No Assignment or Transfer.

This Agreement, or any interest herein, shall not be assigned, transferred or otherwise encumbered under any circumstance by Entertainment Solutions without the prior written consent of Tempe.

13. Succession.

This Agreement and the rights and obligations contained herein shall inure to the benefit of the parties' respective successors upon the mutual consent of both parties.

14. Survival.

Any rights either party may have in the event it terminates this Agreement pursuant to the terms hereof shall survive such termination.

15. Authorization to Enter Agreement.

By execution of this Agreement and the signatures shown below, each party certifies that the officer executing this Agreement on its behalf is fully authorized to act on behalf of and bind the party as to all matters contained in this Agreement.

16. Entire Agreement.

This Agreement incorporates and includes all prior negotiations and understandings applicable to the matters contained herein. The parties agree that this Agreement constitutes the entire understanding and agreement between the parties and supersedes previous agreements and representations whether written or oral.

17. Joint Preparation.

The preparation of this Agreement has been a joint effort of the parties, and the resulting document shall not, solely as a matter of judicial construction, be construed more severely against one or more of the parties than the other.

18. Amendments in Writing.

This Agreement may not be changed, altered or modified except by an instrument in writing signed by the persons receiving the notices as identified in paragraph 22 of this agreement or their successors.

19. Provisions Severable.

In the event any term or provision of this Agreement shall be determined by appropriate judicial authority to be illegal or otherwise invalid, such provision shall be given its nearest legal meaning or be construed or deleted as such authority determines, and the remainder of this Agreement shall be construed to be in full force and effect.

20. Captions and Paragraph Headings.

Captions and paragraph headings contained in this Agreement are for convenience and reference only and in no way define, describe, extend or limit the scope or intent of this Agreement, nor the intent of any provisions hereof.

21. Counterparts.

This Agreement may be executed in one or more counterparts, each of which shall be deemed to be an original but all of which shall constitute one and the same Agreement.

22. Notices.

Whenever any party desires to give notice to another party, it must be given by written notice, mailed by first class mail, addressed to the party at the address shown in this Agreement and shall be effective when received.

Information for Entertainment Solutions of Arizona, Inc.: Information for City of Tempe:

Kenneth C. Koziol, President
4130 N. Goldwater #215
Scottsdale, AZ 85251

Mark Richwine, Director
Tempe Parks and Recreation
3500 S. Rural
Tempe, AZ 85282

23. Force Majeure.

Except for payment of sums due, no party shall be liable to the other nor deemed in default under this Agreement if and to the extent that such party's performance of this Agreement is prevented by reason of force majeure.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement effective,
_____ **as shown by the signatures below.**

CITY OF TEMPE, a municipal corporation

Neil G. Giuliano, Mayor

ATTEST:

City Clerk

APPROVED AS TO FORM:

City Attorney

Entertainment Solutions of Arizona, Inc.,

Kenneth C. Koziol, President